(2)

No. 91-323

In The

Supreme Court of the United States

October Term, 1991

JOHN FELDMAN AND HOA ADAMS,

Petitioners,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Department Of The Superior Court Of The State Of California For The County of Orange

BRIEF IN RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. WHETHER PETITIONERS' CONVICTIONS FOR THEFT MAY BE ATTACKED ON THE THEORY THAT THE PROSECUTOR MADE AN ALLEGEDLY IMPROPER ARGUMENT WHEN THE RECORD CONTAINS NO EVIDENCE THAT THE PROSECUTOR EVER MADE SUCH AN ARGUMENT.

   A. WHETHER OVERWHELMING EVIDENCE THAT PETITIONERS ENGAGED IN A PATTERN OF TELLING BLATANT LIES AND MISREPRESENTING MATERIAL FACTS TO CONTRIBUTORS WHO REASONABLY RELIED UPON THEIR STATEMENTS IN DECIDING TO MAKE CONTRIBUTIONS WAS SUFFICIENT TO SUPPORT PETITIONERS' CONVICTIONS FOR THEFT.

   B. ALTHOUGH THE RECORD BELIES PETITIONERS' CONTENTION THAT SUCH AN ARGUMENT WAS MADE IN THIS CASE, WHETHER A PROSECUTOR IS PRECLUDED BY THE FIRST AMENDMENT FROM TRYING TO CONVINCE A JURY THAT THE AMOUNT OF COSTS, EXPENSES AND FEES RETAINED BY A FUNDRAISER IS EXCESSIVE AND EVIDENCE OF FRAUD WHERE NO STATUTORY LIMITATION ON FUNDRAISING EXPENSES OR A PRESUMPTION OF FRAUD EXISTS TO BIND OR INFLUENCE THE JURY IN ITS FACTUAL DETERMINATION OF WHETHER THEFT BY FALSE PRETENSES OR EMBEZZLEMENT ACTUALLY OCCURRED.

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

2. WHETHER CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17510.3 AND 17510.4 ARE NARROWLY TAILORED TO ASSIST IN THE PREVENTION OF FRAUD, TO PROMOTE PUBLIC CONFIDENCE IN CHARITIES, AND TO ENSURE THAT THE PUBLIC IS SUFFICIENTLY APPRISED OF INFORMATION VITAL TO THE INFORMED AND INTELLIGENT DISCUSSION OF ISSUES OF PUBLIC CONCERN ENVISIONED BY THE FIRST AMENDMENT.

3. WHETHER CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17510.3 AND 17510.4 ARE VAGUE, AMBIGUOUS, OR UNDULY BURDENSOME IN THEIR REQUIREMENTS THAT FUNDRAISING SOLICITORS INFORM POTENTIAL DONORS OF THE FOLLOWING INFORMATION:

   (A) THE CHARITY'S NAME AND ADDRESS *OR*, IF THERE IS NO SPECIFIC CHARITABLE ORGANIZATION OR FUND, THE MANNER IN WHICH CONTRIBUTIONS WILL BE USED FOR A CHARITABLE PURPOSE;

   (B) WHAT PERCENTAGE OF THEIR CONTRIBUTIONS WOULD GO TO THE CHARITY FOR WHICH SOLICITATION IS BEING MADE *OR* THE ESTIMATED FUNDRAISING EXPENSES OF THE PARTICULAR FUNDRAISING CAMPAIGN *OR*, IN A NON-SALE SOLICITATION, THAT AN AUDITED FINANCIAL STATEMENT OF THE EXPENSES MAY BE OBTAINED BY CONTACTING THE CHARITY OR OTHER ORGANIZATION AT THE ADDRESS DISCLOSED;

   (C) THE NON-TAX-EXEMPT STATUS OF THE CHARITY IF THE ORGANIZATION HAS NO TAX EXEMPTION;

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

(D) HOW MUCH OF THE CONTRIBUTION IS TAX DEDUCTIBLE, IF ANY;

(E) IN CASES WHERE THE ORGANIZATION FOR WHICH SOLICITATION IS BEING MADE HAS A NAME WHICH IMPLIES A STATE LAW ENFORCEMENT CONNECTION WHICH DOES NOT EXIST, THE NUMBER OF MEMBERS IN THE ORGANIZATION, THE NUMBER OF THOSE MEMBERS WHO LIVE OR WORK IN THE DONOR'S COUNTY AND, *IF* THE SOLICITATION IS FOR ADVERTISING, THE STATEWIDE CIRCULATION OF THE PUBLICATION IN WHICH THE ADVERTISING WILL APPEAR.

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BRIEF IN RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI

Pursuant to the Court's request, on behalf of the People of the State of California, Michael R. Capizzi, District Attorney for the County of Orange, California, by E. Thomas Dunn, Jr., Deputy District Attorney, hereby submits the following response to the petition for a writ of certiorari in the above-entitled matter.

COUNTERSTATEMENT

In October 1985, the District Attorney of Orange County, California, filed a civil consumer protection lawsuit against John C. Feldman and Hoa Adams, petitioners

here, to put a stop to the ongoing fraudulent solicitations which petitioners were making, *ostensibly,* on behalf of "charity." As a result of that lawsuit, the District Attorney obtained a preliminary injunction which prohibited Feldman and Adams from lying while soliciting money from the public, from soliciting for non-existent "charities," and from soliciting for fictitious charitable events which were neither held nor scheduled to occur.

On October 15, 1986, the District Attorney obtained a temporary restraining order and a modification of the preliminary injunction. As modified, the preliminary injunction enjoined petitioners from continued violation of California's charitable solicitation laws, from making false statements and representations in connection with their solicitations, and from encumbering or disposing of the funds held by them as of September 5, 1986, which had been obtained as a result of their fundraising activities.

Because petitioners continued to engage in fraudulent activities unabated, ignoring the terms of the injunctions, the restraining order and state law, criminal charges were eventually filed against them in 1987. Petitioners were charged with a total of 76 criminal offenses. The misdemeanor complaint alleged that petitioners not only refused to disclose vital information to prospective donors as required by law, but that they lied by telling donors that 100 percent of contributions would actually go to charity when, in fact, little, or more often, *no* money went to charity; lied by telling donors that they represented charities which, in fact, they did not represent; lied by telling donors that they represented charities which did not even exist; lied by telling donors that

money was needed to take sick children to their "last" sporting event when no sporting event took place or was even contemplated, and made other blatant material misrepresentations of fact in order to obtain other people's money.

Following a trial by jury, on May 11, 1988, petitioners were convicted on sixty-three counts. These convictions fell into the following four categories of misdemeanors: (1) sixteen violations of California Business and Professions Code section 17500 (false advertising)[1]; (2) twenty-four violations of California Business and Professions Code section 17534 (non-compliance with certain mandatory disclosure requirements in connection with solicitations for charity); (3) sixteen theft offenses, including grand theft, petty theft, and attempted petty theft; and (4) seven counts of contempt of court, premised on non-compliance with the preliminary injunction as modified on October 15, 1986.

In Counts 4, 7, 10, 25, 28, 31, 34, 37, 40, 43, 46, 52, 67, 69, 72, 77 and 82, petitioners were convicted of violating Business and Professions Code section 17534, due to their failure to disclose information required by section 17510.3. Specifically, petitioners failed to disclose: (1) the name and address of the charities on whose behalf they were supposedly working; (2) the percentage of the contributions that would be used for a charitable purpose in each fundraising campaign; (3) the tax-exempt status of the charity under state and federal law; and (4) the

[1] The Appellate Department of the Superior Court reversed the convictions under California Business and Professions Code section 17500, and those charges are not before this Court.

percentage of the donation which could be deducted by the donor as a charitable contribution under state and federal law.

During the trial, twelve witnesses testified that they received telephonic solicitations for charitable contributions from petitioners' employees. In Count 4, the victim was not provided any of the information required by section 17510.3 (E.S.S. 18, 19).[2] In Counts 7, 46, 52 and 72, the only information disclosed to the victims was the name of a charitable organization (E.S.S. 8, 9, 16, 17, 31). The victims in Counts 10 and 82 were told only the solicitor's name and that the contribution would be tax deductible (E.S.S. 12, 14). In Counts 25, 40, 69, and 77, the victims were simply told the name of the person soliciting them and the name of the charitable organization (E.S.S. 7, 15, 24).

The victim in Counts 28, 31 and 34 was told the name of the person calling him and the name of the charitable organization. Although he was never told the tax-exempt status of the "charity," the victim inferred that the organization was tax exempt because of the receipt he received (E.S.S. 42, 43). In Count 37, the victim was told only the solicitor's name (which apparently was a false name preceded by the term "Dr.") and the name of the charitable organization (E.S.S. 2, 67).

In Count 43, the victim was told the caller's name, the name of a charitable organization, and that 85 percent of her money would go specifically for the rehabilitation

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[2] E.S.S. refers to the "Engrossed Settled Statement" of facts submitted by the State and certified true and correct by the trial court.

of handicapped children. Despite these representations, the contract between petitioners and the charity provided that petitioners would receive 25 percent of all contributions "off the top," then expenses would be paid, and the charity would get what remained. Moreover, no handicapped child was ever "rehabilitated as a result of the victim's (or any other victim's) donation (E.S.S. 3).

The victim in Count 67 was told the caller's name, the name of the charitable organization, and that 100 percent of her donation would go directly "to the children" (E.S.S. 4-7). The solicitor also told the donor that $100 would pay for six children to attend a "wheelchair basketball tournament" at Anaheim Stadium when no such tournament was ever held, contemplated or possible (E.S.S. 6, 25). In addition, the solicitor failed to give the address of the charitable organization and completely misrepresented the terms of the contract between petitioners and the charity – the same contract outlined above with regard to Count 43.

Petitioners were also convicted in Counts 3, 56, 59, 62, 65, 73 and 78 of violating Business and Professions Code section 17534 by failing to deliver the charitable purpose card required by section 17510.4 following successful telephone solicitations. In each of these counts, the victim was contacted by one of the petitioners' telephone solicitors and agreed to contribute money to the alleged charitable cause. The solicitor then sent someone to pick up the contributions. The victims, when contacted, received a receipt for their contributions; however, the receipts contained none of the disclosures required by section 17510.4. Moreover, the "charitable purpose card" required by section 17510.4 was never provided.

In Counts 2, 6, 9, 12, 16, 29, 35, 38, 41, 47, 53, 60, 63, 66, 75 and 80, petitioners were convicted of various theft violations. All of the victims testified that, had they known less than 25 percent of their contributions would actually go to charity, they would not have donated any money.

Counts 2, 6, 9 and 12 relate to solicitations for the "Wheelchair Basketball Association." When soliciting these funds, the solicitors told the victims that there would be a wheelchair basketball game held on either April 25 or April 26 of 1987 at Cerritos College in Cerritos, California (E.S.S. 50-51). In fact, no event ever took place (E.S.S. 20, 25, 28).

As to Count 2, the victim was told by the solicitor that he was a volunteer when in fact he was paid. The solicitor also told the victim that the solicitation was being made in connection with the All American Youth Foundation when, in fact, it was not (E.S.S. 51). As to Count 6, the victim was led to believe that he was contributing to "Flying Wheels Basketball" and was told he had given to this organization "for many years" (E.S.S. 18).

In Count 9, the victim was explicitly told that the petitioners *were* "Flying Wheels Basketball," a charity she had given to in the past (E.S.S. 18). In reality, petitioners had no affiliation with "Flying Wheels Basketball," never represented "Flying Wheels Basketball," and never had a right to represent "Flying Wheels Basketball." The company victimized in Count 12 was told its donation to the "Wheelchair Basketball Association" would be tax

deductible when, in fact, the Wheelchair Basketball Association was a business and hence "donations" were not tax deductible (E.S.S. 14; Trial Exhibit 2C).

Count 16 alleged petitioners committed grand theft from the All American Youth Foundation between July 1, 1986, and March 18, 1987. During this time, petitioners solicited money in the name of the All American Youth Foundation (E.S.S. 60, 61); however, they had neither a contract to solicit for the Foundation nor permission to use its name (E.S.S. 52, 53).

Counts 38, 41 and 44 involved solicitations made to a Ms. Briney. In Count 41, Ms. Briney was told her money would pay for tickets to take children to see "Disneyland on Ice" (E.S.S. 2-4). However, as petitioners stipulated at trial, no tickets for Disneyland on Ice were ever purchased (Trial Exhibit 1). As to Count 44, petitioners lied to Ms. Briney about what percentage of her contribution would go to charity. She was told 85 percent of her donation would go to the charitable cause (E.S.S. 3-4) when, in fact, only a minuscule fraction of her donation went to charity (E.S.S. 57-62).

Counts 53 and 75 were based mainly on the solicitor's misrepresentations about the intended use of the victims' donations. The victim in Count 53 was told that his $70 donation would take 30 children from Children's Hospital to a baseball game. He was also told that the 30 children would receive a lunch and transportation to the game (E.S.S. 16). In Count 75, the victim was told his contribution would be used to send handicapped children to a baseball game and that $30 would provide lunch, transportation, and tickets to the game for two

children plus the financial support necessary for adult supervision (E.S.S. 8).

Each of these two victims stated he would not have made a donation had the solicitor not lied to him about taking sick and helpless children to baseball games. Petitioners' fraud was further revealed by expert testimony which demonstrated that the percentage of funds that actually went to charity was so small that it could not have begun to pay for the tickets or the food the solicitors told the victims their contributions would cover (E.S.S. 8-9, 16-17, 57-62).

As regards Count 53, all of the tickets to baseball games provided to the Children's Hospital were donated by the Los Angeles Rams football team and were not paid for by any of the victim's contributions (E.S.S. 16-17, 57). Even though the victim's monies were not needed to purchase any of the tickets, petitioners failed even to provide the children with food or transportation, despite the heart-rending representations they had made to their contributors (E.S.S. 16-17, 32-33).

After the petitioners' jury trial, the court, on its own motion, granted a new trial on the theft counts and the unfair business practice counts. Petitioners were sentenced at that time only on the contempt counts and the counts alleging violations of Business and Professions Code 17534. Petitioner Feldman was placed on three years formal probation on condition that he serve 120 days in the county jail on each count, sentences to run concurrently. Petitioner Adams was placed on probation for three years conditioned upon her serving 30 days in

the county jail on each count, sentences to run concurrently.

The People appealed from the order granting the new trial. On December 27, 1989, the Appellate Department of the Superior Court reversed and remanded for resentencing. Subsequently, petitioners made a second motion for new trial which was denied. The trial court then sentenced petitioners on the reinstated counts; however, the sentences were stayed pending disposition of petitioners' appeal.

The opinion of the Appellate Department of the Superior Court here at issue before this Honorable Court was filed on April 19, 1991. The Appellate Department affirmed petitioners' convictions for failure to disclose information as required by the charitable solicitation statutes, for contempt, and for theft, while reversing those for false advertising.

ARGUMENT

I. PETITIONERS' CONVICTIONS ON SIXTEEN COUNTS OF THEFT ARE WITHOUT CONSTITUTIONAL INFIRMITY.

A. CONTRARY TO PETITIONERS' CLAIM IN THE PETITION FOR CERTIORARI, THE RECORD DOES *NOT* DEMONSTRATE THE PROSECUTOR RELIED ON THE PREMISE THAT PETITIONERS' EXCESSIVE FUNDRAISING COSTS AND FAILURE TO SUBMIT TO REGULATIONS WERE EVIDENCE OF FRAUD.

In the third of their three arguments, petitioners contend their convictions under Penal Code sections 484, 487

and 488[3] should be reversed because the prosecutor's argument to the jury violated their First Amendment rights. Petitioners insist that the prosecutor improperly argued that their high solicitation costs and consistent failures to comply with the disclosure requirements of California Business and Professions Code sections 17510.3 and 17510.4 were evidence of fraud.

Preliminarily, respondent invites this Honorable Court's attention to the fact that, when petitioners made this same argument in the court below, the three judge panel of the Superior Court Appellate Department concluded, correctly, that the record is devoid of support for petitioners' contention (Pet., at App. 12). Because petitioners' argument is not supported by the record, it is not properly before this Court.

However, even if the record *did* demonstrate the prosecutor argued petitioners' "excessive fund-raising cost and failure to submit to regulations" was "evidence of fraud," such an argument would have been completely proper under the First Amendment to the United States Constitution. None of the cases cited by petitioners holds to the contrary, as will appear below.

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[3] In California, the generalized crime of theft described in Penal Code Section 484 includes the crimes of obtaining money by false pretenses and embezzlement. Penal Code section 487 defines "grand theft," and section 488 specifies that theft in all other cases is "petty theft."

B. CALIFORNIA STATUTES DEALING WITH CHARITABLE SOLICITATIONS NEITHER LIMIT THE AMOUNT OF CONTRIBUTIONS WHICH CAN BE USED TO PAY FUND-RAISING EXPENSES NOR DO THEY UTILIZE A PERCENTAGE-BASED TEST FOR FRAUD IN VIOLATION OF THE FIRST AMENDMENT.

Petitioners rely primarily upon *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), and *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), for the proposition that, when a prosecutor tries to convince a jury that a high percentage of fundraising costs is evidence of fraud, the prosecutor violates the defendant's First Amendment rights. But *Riley* and *Munson* say nothing of the kind.

In *Munson, supra,* a Maryland statute forbad a charitable organization from "pay[ing] or agree[ing] to pay as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of . . . fund-raising activity." *Id*, 467 U.S. at 950, n. 2. Where the amount of expenses to be paid exceeded 25 percent, the statute subjected both the fundraiser and the charity to criminal liability. *Ibid.*

In *Riley, supra,* a North Carolina statute prohibited professional fundraisers from charging "unreasonable" or "excessive" fees, which the statute defined with a three-tier schedule. While a fee of up to 20 percent was deemed "reasonable" under the statute, a fee exceeding 35 percent was *presumed* to be unreasonable, thus placing on the solicitor the burden of rebutting the presumption. *Id.*, 487 U.S. at 784-785.

In *Munson,* the majority recognized "that there is no *necessary* connection between fraud and high solicitation and other administrative costs" and held that a percentage limitation, even where the statute provides for exceptions, is not a "narrowly drawn regulatio[n] designed to serve [the state's] interes[t] without unnecessarily interfering with First Amendment freedoms." *Munson,* 467 U.S. at 961, quoting from *Schaumburg v. Citizens For a Better Environment,* 444 U.S. 620, 637 (1980).

In *Riley,* the majority held that the fact a professional fundraiser's fee exceeds the percentage of contributions a statute defines as "reasonable" does not *necessarily* prove that the fundraiser committed fraud. Accordingly, the North Carolina statute which made evidence of expenses exceeding the specified percentage *presumptive* proof of fraud was said to violate the First Amendment.

California's statutes, in stark contrast to the statutes at issue in *Munson* and *Riley, do not utilize a percentage-based test for fraud.* On the contrary, California Business and Professions Code section 17510.3 states simply that a prospective donor must be told "[t]he amount [of the contribution], stated as a percentage of the total gift or purchase price, that will be used for charitable purposes." The statute does not make *any* particular percentage fraudulent; it states no "reasonable" or "unreasonable" fee; it contains no limitation; it imposes no presumption.

Thus, where a State's attorney prosecutes an individual for theft offenses under California Penal Code sections 484, et seq., and endeavors to persuade jurors that a certain percentage of expenses is excessive and fraudulent, the prosecutor's argument simply offers the jury an

opportunity to resolve a question of fact, the resolution of which is not tied to or based upon the dictates of any statute. In such cases, the prosecutor merely proposes an argument, not unlike most arguments that address questions of intent or other mental states, which relies upon circumstantial evidence to prove an element of the offense at issue. To say this presents a constitutional question, much less a constitutional dilemma, strains credulity.

C. SUMMARY OF THE PROSECUTOR'S ARGUMENTS IN SUPPORT OF THE THEFT ALLEGATIONS.

The Engrossed Settled Statement reflects that the prosecutor argued that theft was shown based upon two separate theories:

> "One theory was theft by false pretenses. That theory was that through misrepresentations or misstatements, the victims were told that their money was going to take a certain amount of children to an event, and that did not happen. Rather, 20% or less went to a 'charitable purpose.' In most instances, 10% or less actually went to take handicapped children to an event. In the instances of the Wheelchair Basketball Association theft counts, no money ever went to take handicapped children to the wheelchair basketball game because the wheelchair basketball game was never held." (E.S.S. 83, 84.)

As the record shows, the prosecutor argued that petitioners made affirmative misrepresentations to the

donors concerning the intended use of their contributions. These fraudulent misrepresentations fully supported the charges of theft by false pretenses. The evidence at trial demonstrated that petitioners were wholly unconcerned with conforming their conduct to the requirements of California Business and Professions Code sections 17510.3 and 17510.4. The only reason they made the representations that they *did* make was to induce unsuspecting individuals to part with their money.

The State's attorney also argued that petitioners committed theft by embezzlement. Using this theory, the prosecutor explained that, when the victims responded to petitioners' affirmative representations by contributing, the donors, in essence, were granting petitioners the right to use their money solely for the purposes proposed in petitioners' representations. Thus, a constructive trust resulted which entitled petitioners to use the funds received for the sole purpose of helping the handicapped, taking children to charitable events, providing drug education in the schools, or whatever the particular representation was when the money was given.

However, the defendants used this charitable money held in constructive trust for a number of other purposes not revealed to the donors. These included, at minimum, paying 25% to the telephone solicitor, 10% to the donation "runner,"[4] 25% to petitioner Feldman,[5] and

[4] The "runner" was the person sent to pick up the contribution following a successful telephone solicitation.

[5] Petitioner Adams lived with Petitioner Feldman. Feldman apparently took care of Petitioner Adams's financial needs.

approximately 12% for rent and phone costs. At trial, each victim testified that petitioners did not have permission to use the money given them for any purpose other than that which was specified and explained in the original phone solicitation. The prosecutor argued, accordingly, that petitioners committed theft by embezzlement, an argument the jury was free to accept or reject.[6]

II. CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17510.3 AND 17510.4 ARE NARROWLY TAILORED TO THE STATE'S COMPELLING INTEREST IN PREVENTING FRAUD AND ENSURING THE DISSEMINATION OF VITAL INFORMATION TO THE PUBLIC IN A MANNER CONSISTENT WITH THE CORE PURPOSE OF THE FIRST AMENDMENT.

Petitioners were convicted of seventeen violations of Business and Professions Code section 17534,[7] due to their failures to disclose information required by section 17510.3. In seven other counts, petitioners were convicted of violating section 17534 for failing to deliver the

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[6] The overwhelming evidence of a consistent pattern of misrepresentation by petitioners which appears in the trial record is outlined in the "Counterstatement" of the case, above. Accordingly, it will not be repeated here. Suffice it to say that the facts adduced at trial demonstrated that petitioners' convictions were based upon the blatant lies told by petitioners to prospective donors, which false statements were not compelled by any California statute.

[7] Section 17534 provides, "Any person, firm, corporation, partnership or association or any employee or agent thereof who violates this chapter is guilty of a misdemeanor."

charitable purpose card required by section 17510.4. Petitioners appear to assert that each category of information in section 17510.3 is unconstitutional under *Riley, supra*. However, *Riley* fails to support such a sweeping generalization.

A. CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 17510.3, SUBDIVISION (a)(1), IS CONSTITUTIONAL UNDER FOOTNOTE 11 OF THIS COURT'S *RILEY* DECISION.

The majority in *Riley* noted that an unchallenged portion of the North Carolina disclosure law required professional fundraisers to disclose their professional status to potential donors, thereby giving notice that at least a portion of the money contributed would be retained. *Riley, supra*, 487 U.S. at 799. The Court further observed in footnote 11 that the North Carolina Act required the fundraiser to disclose his or her employer's name and address.

Having recited these provisions of the North Carolina statute, the majority cautioned, "[N]othing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny." *Id.*, at n. 11.

The North Carolina statute requiring the fundraiser to disclose his or her employer's name and address is virtually identical to the provision stated in California

Business and Professions Code section 17510.3, subdivision (a)(1), which petitioners argue is unconstitutional under *Riley*. Subdivision (a)(1) of section 17510.3 requires the solicitor to provide the name and address of the combined campaign, each organization, or fund on behalf of which all or any part of the money collected will be utilized for charitable purposes. Clearly, under footnote 11 of *Riley*, this subdivision is constitutionally valid.

Because section 17510.3, subdivision (a)(1), does not offend the First Amendment, even were petitioners' argument correct that the remainder of section 17510.3 is unconstitutional, petitioners' convictions should not be affected. Sufficient evidence exists in the record to support each conviction on the basis of violations of subdivision (a)(1) alone. Consequently, even assuming, without conceding, that subdivisions (a)(2) through (a)(8) of section 17510.3 are unconstitutional, the convictions on Counts 4, 7, 10, 25, 28, 31, 34, 37, 40, 43, 46, 52, 67, 69, 72, 77 and 82 should be sustained.[8]

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[8] Again, the specific evidence applicable to each count is outlined in the "Counterstatement" of the case, above, and, for the sake of brevity, it will not be repeated here.

B. CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17510.3, SUBDIVISIONS (a)(2) THROUGH (a)(8), AND 17510.4 ARE ALSO CONSTITUTIONAL BECAUSE THEY ARE NARROWLY TAILORED TO ASSIST IN THE PREVENTION OF FRAUD, TO PROMOTE PUBLIC CONFIDENCE IN CHARITIES, AND TO ENSURE THAT THE PUBLIC IS SUFFICIENTLY APPRISED OF INFORMATION VITAL TO THE INFORMED AND INTELLIGENT PUBLIC DISCUSSION ENVISIONED BY THE FIRST AMENDMENT.

In *Riley, supra,* the majority of this Court struck down a North Carolina statute requiring solicitors to disclose the "average of the percentage of gross receipts actually paid" to *all* charities for which the fundraiser had acted during the twelve previous months. *Id.*, 487 U.S. at 795; North Carolina General Statutes section 131C-16.1 (1986). Such a provision was obviously burdensome and overbroad. It required information completely irrelevant to the solicitation occurring at the time of the disclosure, without regard to the unique aspects of each separate solicitation. *Id.*, 487 U.S. at 800, n. 12. Accordingly, the majority of this Court concluded the statute was not narrowly tailored to achieve its stated goal. Understandably.

At the same time, however, this Court acknowledged that "[t]he interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation." *Id.*, 487 U.S. at 792. California Business and Professions Code sections 17510.3 and 17510.4 are such narrowly drawn regulations.

All that California has done is required solicitors to inform each prospective donor about the specific arrangement they have with the particular charity for whom they are then soliciting. No perusal of voluminous records from the past twelve months is required. No tabulation and mathematical averaging are called for. Only a simple recitation of the terms of the agreement between the fundraiser and the one specific charity for whom that fundraiser is soliciting need be revealed. On the other hand, if no firm arrangement has been consummated (as unlikely as that may be), the statute merely requires that an estimate be given.

The provision of this and the other basic information required by section 17510.3 enables a prospective donor to make an informed decision as to whether or not a donation would be a wise expenditure of the donor's sometimes meager funds and gives the donor information that can be verified for its truthfulness and accuracy. At the same time, information required by section 17510.3 includes facts which are easily ascertainable by the solicitor and which can be recited in a matter of seconds. In fact, in door-to-door solicitations, they need not be recited at all so long as the pre-printed card is provided. The intrusion on speech is minimal.

As California Business and Professions Code section 17510 explains,[9] sections 17510.3 and 17510.4 were enacted to address an insidious problem plaguing the people of California. Pervasive fraud had been perpetrated on the public by unscrupulous fundraisers

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[9] The pertinent provisions of section 17510 are appended to this response in Appendix 1.

intent on "making a buck" at anyone's expense. Affirmative state action was essential to protect the public's interest in fair solicitations. Accordingly, California endeavored to create a climate in which misrepresentations would be discouraged.

In respondent's view, the public's interests are advanced by requiring petitioners to state in a concise and unburdensome way who they are and what they want other people's money *for*. Discriminating donors may then verify the information they have been provided and make contributions which go to assist true charities and not someone's commercial enterprise.[10] California's statutes provide a prudent and measured approach to the problem which the state believes will withstand constitutional scrutiny.

III. CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17510.3 AND 17510.4 CLEARLY COMMUNICATE WHAT VERBAL AND WRITTEN DISCLOSURES ARE NECESSARY FOR COMPLIANCE WITH THE STATUTE. NEITHER IS VAGUE, AMBIGUOUS, OR UNDULY BURDENSOME.

Petitioners argue that California Business and Professions Code sections 17510.3 and 17510.4 are constitutionally invalid because the statutes' disclosure requirements are vague. A statute is void for vagueness when men of common intelligence must necessarily guess

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[10] The speech of such a commercial enterprise, incidentally, ought to be analyzed as "*commercial* speech." The only "public issue" contemplated by petitioners' speech concerns fraud in the charitable fundraising industry – a discussion which respondent believes is entitled to minimal, if any, First Amendment protection. *Munson, supra,* 467 U.S. at 966.

at the statute's meaning. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). A statute can be void for vagueness when individuals contemplating a communication cannot determine whether the communication will subject them to the operation of the law. Sections 17510.3 and 17510.4 are not vague on their face, nor are they vague as applied to petitioners.

On its face, section 17510.4 clearly says that telephone solicitors must disclose the information specified in section 17510.3. Thus, a telephone solicitor does not need to be a brain surgeon[11] to comprehend that, when he makes telephone solicitations, he must provide that information. How much more clear could a statute be?

Section 17510.3, subdivisions (a)(1) through (a)(8), detail the information the solicitor must disclose to the potential donor. This information is simple to understand, clear and unambiguous. However, petitioners claim that section 17510.3, subdivision (a)(3), is vague in its requirement that solicitors disclose the "amount, stated as a percentage of the total gift or purchase price, that will be used for charitable purposes." Certainly this requirement is not vague. It seems clear to respondent that it means the solicitor must tell the donor what percentage of the donation will go to charity.

Petitioners also argue, however, that the solicitor may not be able to calculate the percentage at the time the solicitation is made because the fee may depend on the total amount raised. This argument is wholly without merit.

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[11] Even though one solicitor at least represented himself to be a doctor. . . .

It is not unreasonable to assume that, prior to *any authorized* solicitation, an agreement will be reached between the solicitor and the charity which determines what the solicitor will be paid and allowed to spend on the campaign. Even so, were there to be no agreement, and a charity were to permit its fundraiser to give the charity whatever the fundraiser decided it could part with,[12] unencumbered by any concern for the charitable reason behind the contribution, the statute, on its face, does not preclude the solicitor from informing the donor that no precise agreement as to a percentage has been reached. As a matter of fact, contrary to the argument submitted in the petition for certiorari, Business and Professions Code section 17510.3, subdivision (a)(4), provides an alternative to subdivision (a)(3) which *expressly permits* solicitors to state an "estimated" cost for the fundraising activities *in lieu of* any percentage figure.

In any case, petitioners are arguing about a danger that has never materialized – about what, in petitioners' fertile imaginations, *might* conceivably happen. This is nothing but rank speculation. In every count alleged in the complaint where petitioners actually *had* the right to represent a legitimate charity (and there were a few), there was either an agreement or a written contract which expressly specified the sums the charity would receive. These arrangements could have been communicated to the prospective donors. They were not. On the contrary, when people asked how much of their donations would

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[12] A charity so loose in its affairs would probably deserve whatever paltry sum its solicitor deigned to devolve upon it.

actually go to charity, the solicitors were simply trained to say with confidence, "100 percent!" (R.S.S. 199.)

As for the burden imposed by California's charitable solicitation statutes, that "burden" is minimal. The only burden the statute imposes is the burden of providing basic information that can be verified by the individuals solicited.[13] The statute requires only that, in most cases, three statements be made so that donors will have the opportunity to assure themselves, through *their own* subsequent efforts and investigation, that their money is being used in the manner they intended.[14]

Thus, these statutes do not unduly burden the interests protected by the First Amendment. In contrast to the statutes at issue in *Munson* and *Riley*, they do not attempt to punish either charities or solicitors when fundraising expenses exceed what the government arbitrarily decides is excessive. Rather, they facilitate the flow of vital information in a narrowly tailored fashion consistent with the teachings of this Court's precedent. California Business and Professions Code sections 17510.3 and 17510.4

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[13] Petitioners grossly overstate their case when they insist that California has provided a "script" for them to follow. Although respondent realizes there is no evidentiary value in it, its counsel, without practice, can fully state the information required by sections 17510.3 and 17510.4 politely in less than 30 seconds.

[14] A solicitor's failure to carry the "burden" of telling the truth in connection with representations made to a prospective donor is primarily subject to prosecution for theft by false pretenses. The thrust of Business and Professions Code sections 17510.3 and 17510.4 is simply to ensure the provision of the information.

advance the interests which the First Amendment was designed to protect by ensuring that the public discussion is an *informed* discussion in which truth is ascertainable.

Were charitable fundraisers not required to provide the basic information required in sections 17510.3 and 17510.4, individuals succumbing to solicitors' sometimes heart-rending, emotional tactics would often have no *material* representations upon which to build the kind of case for fraud that this Court encouraged States vigorously to prosecute in *Riley, supra,* 487 U.S. at 795. Surely the First Amendment was not intended to be a shield to protect blatant fraud or, much less, a sword used to carve a swath out from under the unsuspecting and uninitiated member of the public.[15]

CONCLUSION

Accordingly, respondent urges this Court to deny certiorari as to the questions presented in petitioners' second and third issue statements. With regard to the first issue phrased in the petition, if this Court believes the California statute is *not* narrowly tailored under the *Riley* decision to achieve the compelling interests California here asserts, then respondent invites this Honorable Court to grant certiorari limited to this specific issue as a

[15] If the provision of such precise and limited information creates a "burden" on a person set on practicing treachery upon the innocent and unsophisticated, as Lennon and McCartney once suggested in a song, "Let It Be."

vehicle for reconsidering or distinguishing *Riley*. Otherwise, the petition should be denied.

DATED this 12th day of November, 1991.

Respectfully submitted,

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APPENDIX 1

California Business and Professions Code section 17510 provides:

"(a) The Legislature finds that there exists in the area of solicitations and sales solicitations for charitable purposes a condition which has worked fraud, deceit and imposition upon the people of the state which existing legal remedies are inadequate to correct. Many solicitations for charitable purposes have involved situations where funds are solicited from the citizens of this state for charitable purposes, but an insignificant amount, if any, of the money solicited and collected actually is received by any charity. The charitable solicitation industry has a significant impact upon the well-being of the people of this state. The provisions of this article relating to solicitations and sale solicitations for charitable purposes are, therefore, necessary for the public welfare.

(b) The Legislature declares that the purpose of this article is to safeguard the public against fraud, deceit and imposition, and to foster and encourage fair solicitations and sales solicitations for charitable purposes, wherein the person from whom the money is being solicited will know what portion of the money will actually be utilized for charitable purposes. This article will promote legitimate solicitations and sales solicitations for charitable purposes and restrict harmful solicitation methods, thus the people of this state will not be misled into giving solicitors a substantial amount of money which may not in fact be used for charitable purposes."